



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 945

[Doc. No. AMS-SC-17-0077; SC18-945-1 FR]

**Irish Potatoes Grown in Certain Designated Counties in
Idaho, and Malheur County, Oregon; Modification of Handling
Regulations**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule implements a recommendation from the Idaho-Eastern Oregon Potato Committee (Committee) to revise the varietal classifications that determine the size requirements for Irish potatoes grown in certain designated counties of Idaho, and Malheur County, Oregon. As provided under section 8e of the Agricultural Marketing Agreement Act of 1937, this modification also applies to all imported long type Irish potatoes. This final rule also makes administrative revisions to the subpart headings to bring the language into conformance with the Office of Federal Register requirements.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Barry Broadbent, Marketing Specialist, or Gary D. Olson, Regional Manager, Northwest Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326-2724, Fax: (503) 326-7440, or Email: Barry.Broadbent@usda.gov or GaryD.Olson@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or Email: Richard.Lower@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This final rule, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final rule is issued under Marketing Agreement No. 98 and Order No. 945, as amended (7 CFR part 945), regulating the handling of Irish potatoes grown in certain designated counties in Idaho, and Malheur County, Oregon. Part 945 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The

Committee locally administers the Order and is comprised of potato producers and handlers operating within the production area.

Section 8e of the Act provides that whenever certain specified commodities, including potatoes, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodities.

The Department of Agriculture (USDA) is issuing this final rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this final rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' " (February 2, 2017).

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

Under the terms of the Order, fresh market shipments of Idaho-Eastern Oregon potatoes are required to be inspected and are subject to minimum grade, size, quality, maturity, pack, and container requirements. This final rule revises the varietal classifications that determine the size requirements for potatoes handled under the Order. As required under section 8e of the Act, the revisions to the Order's varietal classifications will also be applied to imported long type potatoes.

At its meeting on November 8, 2017, the Committee unanimously recommended revising the varietal classifications that determine the size requirements for U.S. No. 2 grade potatoes. Sections 945.51 and 945.52 provide authority for the establishment and modification of grade, size, quality, and maturity regulations applicable to the handling of potatoes.

Section 945.341 establishes minimum grade, size, quality, maturity, pack, and container requirements for potatoes handled subject to the Order. The Order's handling regulations currently have two different size requirements for U.S. No. 2 grade potatoes. The requirements are applied based upon the varietal

classification of the subject potato. Prior to this action, the varietal classifications that determine which of the different size requirements are applicable are designated as "round varieties" in § 945.341(a)(2)(i) and as "all other varieties" in § 945.341(a)(2)(ii).

This final rule removes the designation "round varieties" in § 945.341(a)(2)(i) to make the size requirements in that paragraph applicable to all U.S. No. 2 grade potatoes, unless otherwise specified. In addition, this final rule changes the designation for "all other varieties" in § 945.341(a)(2)(ii) to "Russet types," maintaining the larger size requirements for "Russet types" only.

Committee members reported that the Idaho-Eastern Oregon potato industry has been producing and shipping an increasing number of non-traditional potato varieties, such as oblong, fingerling, and banana potatoes. Prior to this final rule, the size requirements contained in the handling regulations did not adequately differentiate between the various types of potatoes to effectively regulate the unique varieties that are now being marketed from the production area. Without a clear distinction, there

existed the potential to inhibit orderly marketing of such potatoes by requiring them to adhere to size requirements that were never intended to be applied to that type or variety. Designating potatoes as "round varieties" and "all other varieties" was appropriate when the regulations were initially established, but potatoes from the production area are now segmented into two different market sectors: Russet type potatoes and all other non-Russet varieties. The characteristics of each of these market sectors continues to need different minimum size requirements. However, with the previous size requirement classifications in the handling regulations, some varieties of potatoes were being required to meet size requirements that did not match their natural characteristics or their intended market outlet.

For example, Russet varieties are primarily utilized as baked potatoes or are peeled and further prepared by the consumer as products such as french fries, potato salad, or mashed potatoes. The Committee intends for the size requirements for these potatoes to be greater than for other varieties of potatoes and those size requirements match the likely utilization of such potatoes. Non-Russet

type potatoes are typically marketed fresh and are prepared and consumed whole. These types, while predominantly round varieties, include unique varieties that could not be described as "round" but are also not comparable to Russet types. Requiring non-Russet type potatoes to meet size requirements intended for potatoes used for baking or french fries puts those potatoes at a marketing disadvantage.

The Committee believes that potato size is a significant consideration of potato buyers. Providing potato buyers with the sizes desired by their customers for the type of potato that is being marketed is important to promoting potato sales. The size requirements intended to facilitate orderly marketing should not unintentionally inhibit a market segment, even if that segment is a minor one. Modifying the size requirement classifications to meet the intent of the Committee will help facilitate the growth of the emerging market for unique potato varieties. This change is expected to improve the marketing of Idaho-Eastern Oregon potatoes and enhance overall returns to handlers and producers.

This final rule relaxes the current handling regulations for non-round potatoes that are also not Russet type. Such potatoes will be subject to the smaller size requirements that have been, and will continue to be, applied to round varieties of potatoes. The Committee believes that, while these potatoes represent a small market segment relative to the total output from the production area, the market is expected to grow, and the Order's handling regulations should be responsive to it.

Section 8e mandates the regulation of certain imported commodities whenever those same commodities are regulated by a domestic marketing order. Irish potatoes are one of the commodities specifically covered by section 8e in the Act. In addition, section 8e stipulates that whenever two or more such marketing orders regulating the same agricultural commodity produced in different areas are concurrently in effect, imports must comply with the provisions of the order which regulates the commodity produced in the area with which the imported commodity is in the "most direct competition." 7 C.F.R.

§ 980.1(a)(2)(iii) contains the determination that imports of long type potatoes during each month of the year are in

most direct competition with potatoes of the same type produced in the area covered by the Order.

Minimum grade, size, quality, and maturity requirements for potatoes imported into the United States are currently in effect under § 980.1. Section 980.1(b)(2) stipulates that, through the entire year, the grade, size, quality, and maturity requirements of the Order applicable to potatoes of all long types shall be the respective grade, size, quality, and maturity requirements for imported potatoes of all long types. Therefore, this action relaxes the minimum size requirements for imports of non-round U.S. No. 2 grade long type potatoes, other than Russet types, accordingly.

This final rule also allows potato importers to respond to the changing demands of domestic consumers. The domestic market's increasing preference for unique potato varieties applies to imported potatoes as well as to domestically produced potatoes. In addition, the higher prices that the unique potatoes are expected to command will also apply to imported product. Thus, importers are expected to benefit along with domestic producers and

handlers by increased sales of U.S. No. 2 grade potatoes and increased total revenue.

Final Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Import regulations issued under the Act are based on those established under Federal marketing orders.

There are approximately 32 handlers of Idaho-Eastern Oregon potatoes who are subject to regulation under the Order and about 450 potato producers in the regulated area.

In addition, there are approximately 255 importers of all types of potatoes, many of which import long types, who are subject to regulation under the Act. Small agricultural service firms, which include potato handlers and importers, are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$7,500,000, and small agricultural producers are defined as those whose annual receipts are less than \$750,000 (13 CFR 121.201).

During the 2016-2017 fiscal period, the most recent full year of statistics available, 37,449,300 hundredweight of Idaho-Eastern Oregon potatoes were inspected under the Order and sold into the fresh market. Based on information provided by the National Agricultural Statistics Service, the average producer price for the 2016 Idaho potato crop was \$6.75 per hundredweight. Multiplying \$6.75 by the shipment quantity of 37,449,300 hundredweight yields an annual crop revenue estimate of \$252,782,775. The average annual fresh potato revenue for each of the 450 producers is therefore calculated to be \$561,740 ($\$252,782,775$ divided by 450), which is less than the SBA threshold of \$750,000. Consequently, on average, most of the Idaho-

Eastern Oregon potato producers may be classified as small entities.

In addition, based on information reported by USDA's Market News Service, the average f.o.b. shipping point price for the 2016-2017 Idaho potato crop was \$11.79 per hundredweight. Multiplying \$11.79 by the shipment quantity of 37,449,300 hundredweight yields an annual crop revenue estimate of \$441,527,247. The average annual fresh potato revenue for each of the 32 handlers is therefore calculated to be \$13,797,726 (\$441,527,247 divided by 32), which is above the SBA threshold of \$7,500,000 for agricultural service firms. Therefore, most of the Idaho-Eastern Oregon potato handlers would be classified as large entities.

Further, based on information from USDA's Foreign Agricultural Service (FAS), potato importers imported 11,157,190 hundredweight of potatoes into the U.S. in 2016 (the most recent full year for which statistics are available). FAS also reported the total value of potato imports for 2016 to be \$212,331,000. The average annual revenue of the estimated 255 potato importers is therefore calculated to be \$832,670 (\$212,331,000 divided by 255),

which is significantly less than the SBA threshold of \$7,500,000. Consequently, on average, most of the entities importing potatoes into the U.S. may be classified as small entities.

This final rule revises the varietal classifications that determine the size requirements for U.S. No. 2 grade potatoes handled under the Order. Specifically, this action removes the designation "round varieties" in § 945.341(a)(2)(i) to make the size requirements in that paragraph applicable to all U.S. No. 2 grade potatoes, unless otherwise specified. In addition, this final rule changes the designation for "all other varieties" in § 945.341(a)(2)(ii) to "Russet types," maintaining the larger size requirements that have been applied to all non-round varieties, but will now only apply them to "Russet types."

Pursuant to section 8(e) of the Act, this revision to the Order's varietal classifications that determine the size requirements for U.S. No. 2 grade potatoes will also be applied to imported long type Irish potatoes.

This action was recommended by the Committee to ensure that the size profile of non-round, non-Russet type U.S. No. 2 grade potatoes will consistently be a size preferred by consumers. This change is expected to improve the marketability of Idaho-Eastern Oregon potatoes and increase returns to handlers and producers. Authority for this final rule is provided in §§ 945.51 and 945.52 of the Order.

At the November 8, 2017, meeting, the Committee discussed the impact of this change on handlers and producers. The change to the varietal classifications that determine the size requirements is a relaxation in regulation. The regulatory change is expected to have a positive, or neutral, impact on industry participants.

The Committee relied on the opinions of producers and handlers familiar with the industry to draw its conclusions regarding the recommended handling regulation change. The Committee received anecdotal evidence from industry members at the November 8, 2017, meeting that there is some confusion in the industry with regards to which size requirements apply to which varieties of potatoes and that

some varieties are being inspected and sized to requirements that were not intended by the Committee. The change to the size requirements clarifies which size requirements are applicable to which potatoes.

This change is expected to lead to increased revenue for handlers and producers. Prior to this action, non-round potato varieties that are not Russet type are required to conform to the larger size requirements, even though the Committee does not believe that this meets its intent with regards to the handling regulation. Better defining the distinct classifications of potatoes will allow more of the non-round, non-Russet type potatoes to enter the market, thereby allowing the sale of potatoes that would have otherwise been restricted. The benefits derived from this action are not expected to be disproportionately greater or less for small handlers or producers than for larger entities.

The Committee discussed alternatives to this change. One consideration was making no change at all to the current regulation. Another alternative was to further differentiate between various varieties and types of

potatoes in the handling regulations. There was some discussion of adding another classification. After consideration of all the alternatives, the Committee decided that the changes effectuated by this action will provide the greatest amount of benefit to the industry with the least amount of burden to producers and handlers.

Further, the Committee's meeting was widely publicized throughout the potato industry, and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the November 8, 2017, meeting was a public meeting, and all entities, both large and small, were able to express their views on this issue.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0178, Vegetable and Specialty Crops. No changes in those requirements are necessary as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule imposes no additional reporting or recordkeeping requirements on either small or large potato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A proposed rule concerning this action was published in the *Federal Register* on May 9, 2018 (83 FR 21188). A copy of the proposed rule was provided to the handlers by the Committee. Finally, the proposal was made available through the internet by USDA and the Office of the Federal Register. A 60-day comment period ending July 9, 2018, was

provided to allow interested persons to respond to the proposal.

One comment was received. The commenter questioned why the proposed change would only apply to the Order's production area and not to all potato growing regions. Marketing orders only regulate the production area as defined in each respective order. Therefore, this change can only apply to the handling of potatoes in the Order's production area as defined in § 945.4. The commenter did not otherwise address the merits of the proposal. Accordingly, no changes will be made to the rule as proposed, based on the comment received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this final rule.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 945

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth above, 7 CFR part 945 is amended as follows:

PART 945 - IRISH POTATOES GROWN IN CERTAIN DESIGNATED COUNTIES IN IDAHO, AND MALHEUR COUNTY, OREGON

1. The authority citation for part 945 continues to read as follows:

Authority: 7 U.S.C. 601-674.

[Subpart Redesignated as Subpart A]

2. Redesignate "Subpart—Order Regulating Handling" as "Subpart A—Order Regulating Handling".

[Subpart Redesignated as Subpart B and Amended]

3. Redesignate "Subpart—Rules and Regulations" as subpart B and revise the heading to read as follows:

Subpart B—Administrative Requirements

[Subpart Redesignated as Subpart C]

4. Redesignate "Subpart—Assessment Rates" as "Subpart C—Assessment Rates".

[Subpart Redesignated as Subpart D and Amended]

5. Redesignate "Subpart—Handling Regulations" as subpart D and revise the heading to read as follows:

Subpart D—Handling Requirements

6. In § 945.341, revise paragraphs (a) (2) (i) and (ii) to read as follows:

§ 945.341 Handling regulation.

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(a) * * *

(2) *Size—(i) All varieties, except Russet types. 1⁷/₈ inches minimum diameter, unless otherwise specified on the container in connection with the grade.*

(ii) Russet types. 2 inches minimum diameter, or 4 ounces minimum weight: Provided, That at least 40 percent of the potatoes in each lot shall be 5 ounces or heavier.

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Dated: September 27, 2018

Bruce Summers,

Administrator,

Agricultural Marketing Service.

BILLING CODE 3410-02 P

[FR Doc. 2018-21480 Filed: 10/2/2018 8:45 am; Publication Date: 10/3/2018]